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No. 85-1345

IN THE

Supreme Court of the United States

October Term, 1985

J. A. CROSON COMPANY,

Petitioner,

v.

CITY OF RICHMOND,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Is the factual basis for enacting the ordinance requiring thirty per cent of the city's construction contracts to be awarded to minority race subcontractors inadequate under *Wygant v. Jackson Board of Education*?

Is the ordinance carefully tailored to meet an identified remedial need as specified in *Wygant v. Jackson Board of Education*?

STATEMENT REQUIRED BY RULE 28.1

The only parent company, subsidiary, or affiliate of J. A. Croson Company is Eastway Supplies, Inc., 1561 Creek Drive, Columbus, Ohio 43209.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent part of the ordinance and minority utilization Plan of the City of Richmond, more fully set out in the Appendix, p. 247, is as follows:

> ARTICLE VIII-A
>
> Minority Business Utilization Plan
>
> A. *Covered Contracts*
>
> All contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises. Where the general contractor is a minority business enterprise this requirement shall be deemed to be met by the award.
>
> B. *Rules and Regulations*
>
> The Director of the Department of General Services shall be authorized to promulgate rules and regulations to implement the above requirements, which rules and regulations shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved.

C. *Article Remedial; Effective through June 30, 1988*

This article is remedial and is enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors.

This article shall be in force and effect thirty days from adoption, but shall expire and terminate as of the last moment of June 30, 1988.

The following definitions apply:

"Minority Business Enterprise. A business at least fifty-one per cent of which is owned by minority group members or, in case of a stock corporation, at least fifty-one percent of the stock of which is owned by minority group members.

"Minority Group Members. Citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." (App. 241-42).

I.

The Factual Basis For Enacting The Ordinance Requiring 30% Of The City's Construction Contracts To Be Awarded To Minority Race Subcontractors Is Inadequate Under *Wygant v. Jackson Board Of Education*

In its decision of May 19, 1986, in the case of *Wygant v. Jackson Board of Education*, ___ U.S. ___ (1986), the factual justification for a race-based employee layoff policy was held inadequate under the equal protection clause of the Fourteenth Amendment.[1] The *Wygant* case was not addressed in the Petition for Certiorari filed herein on February 11, 1986.

In this case the challenge under the equal protection clause is to the initial justification and subsequent means of implementation of a requirement that white contractors award thirty per cent of the dollar amount of construction contracts with the City of Richmond to black subcontractors. The factual record was fully developed in the trial court.

The effect of *Wygant* is that general articulations of societal discrimination are not sufficient to permit adoption of a racial classification. And, if prior discrimination is to be established by statistics used in conjunction with statements of societal discrimination, the statistics must be probative of discrimination. ___ U.S. ___ , slip op. at 6 (Powell, J.)

The statistical analysis offered by the City only compared representation of blacks in the population with those awarded contracts as general contractors. There was no effort to show a disparity between the number of black contractors and contracts awarded them. Use of such a statistic cannot be said to "isolate a sufficiently important governmental purpose that could support the challenged provisions." ___ U.S. ___ , slip

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[1] Wygant did not involve the construction of the scope of the authority of the congress acting under §5 of the Fourteenth Amendment as in *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

op. at 10, (O'Connor, J., concurring). This failure of the City's statistics to show discrimination is the same faulty reasoning rejected in *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

There was no factual basis for determining those minorities (Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts, App. 241-242) which would be accorded the preference. This, plus the total lack of justification for awarding 30% of contracts to minorities constitute the "procedural inadequacy and unjustified breadth" of the race-based classification which were condemned by Justice Stevens in *Fullilove v. Klutznick*, 448 U.S. 448, 532 (1980). See ___ U.S. ___ , slip op. at 6, (Stevens, J., dissenting).

The City lacked the factual predicate for adoption of the ordinance which is required by *Wygant*. The Court of Appeals has applied a relaxed "rational basis" standard of review which is disavowed by a majority of the justices in *Wygant*. ___ U.S. ___ , slip op. at 7 (Marshall, J. dissenting), slip op. at 6, (Powell, J.), slip op. at 10, (O'Conner, J., concurring). Justice Stevens stated that there was a "rational basis" for the plan in *Wygant*, but not for the contract set-asides in *Fullilove*. ___ U.S. ___ , slip op. at 4, 6 (Stevens, J., dissenting).

Here the Court of Appeals, as did the Sixth Circuit Court of Appeals in *Wygant*, 746 F.2d 1152, 1155 (6th Cir. 1984), justified the factual basis for the ordinance by extending great deference to the weight to be accorded to the legislative findings of the City Council. "Our review would be more intrusive into the fact-finding process and the limitation we impose on the finders of fact would be stricter if we were reviewing a judicially created remedy." (App. at 32). The Court of Appeals concluded that the ordinance would be valid if "the legislative history demonstrates that [the City Council] reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." App. at 40.

In finding that the City's determination was "reasonable" under its relaxed standard of review, the Court of Appeals

was persuaded by the fact that there were "congressional findings of discrimination on a national scale" (App. at 37), and that the City's "record" has been and was a part of the national problem. (App. at 37-38). The Court cited the City's statistics that few blacks were awarded contracts as general contractors. (App. at 38).

The City itself has expressly disavowed that it was attempting to rectify any discrimination committed by the City in public contracting. The only statement of purpose in the ordinance itself is that it is to promote "wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors." (App. at 248).

The City's ordinance suffers from the same handicap as the layoff policy at issue in *Wygant*, it institutes a racial classification that was not justified by a remedial purpose.

Accordingly, the principles enunciated in *Wygant* would appear to be equally applicable in the instant case. Only by permitting the Court of Appeals to accord the factual findings of the City Council a lesser level of scrutiny than the equal protection clause required the Sixth Circuit to accord the school board in *Wygant* can the decision below be affirmed.

II.

The Ordinance Is Not Carefully Tailored To Meet An Identified Remedial Need As Specified In *Wygant v. Jackson Board Of Education*

This is not a case in which a remedial plan was developed with the consent of those adversely affected. ___ U.S. ___ , slip op. at 2, 6 (Marshall, J., dissenting); slip op. at 7 (Stevens, J., dissenting). The ordinance is a broadly fashioned device with serious impact on those businesses which must bear the burden of implementing it. Neither the City nor the majority race contractors have been shown to have committed a wrong. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971).

The burden on white contractors is therefore more than the "relatively light" 10% goal at issue in *Fullilove*. See ___ U.S. ___ , slip op. at 13 (Powell, J.).

The need to narrowly tailor the ordinance to meet an identified remedial need is seen in the fact that under the City's ordinance the burden falls with particularity on the white contractor.

It is he who must award 30% of the contract price as long as there is a minority contractor who can do the work. It does not matter if the work is of a type which the majority contractor would do with his own forces. The City does not consider whether the price of the subcontract is too high. The white contractor must compete with minority general contractors who do not have to engage minority subcontractors. Other instances of the failure to carefully tailor to a particular fact situation are discussed in Question B of the Petition for Certiorari.

In holding that the 30% set-aside requirement was reasonable in light of the 50% minority population of the City, the Court of Appeals speculated that,

> "Although there are currently few MBE's in the Richmond area, we think the establishment of a 30% set-aside requirement for a five-year period, with adequate waiver provisions, is reasonable in light of the undisputed fact that minorities constitute 50% of the population of Richmond." App. at 43-44.

However, neither the Court of Appeals nor the City Council has any factual predicate for such speculation. In the instant case there has been no basis offered for the selection of the 30% set-aside. There is no evidence that the City considered any less intrusive means of remedying whatever problems it thought it was addressing.

As noted in Judge Wilkinson's dissent,

> "A court can determine that the remedy substantially furthers its asserted purpose only if it is certain that the

persons enacting the remedy know what it was they intended to redress." App. at 103.

This Court's decision in *Wygant* thus makes it clear that in cases of contract set-asides, as in the case of other race-based classifications, the nexus between violation and remedy cannot be left to conjecture.

CONCLUSION

For the foregoing reasons, the Petitioner requests that the Court grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

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